



6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 390

RIN 3064-AE17

Transferred OTS Regulations Regarding Possession by Conservators and Receivers for Federal and State Savings Associations

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final Rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is rescinding and removing the former OTS regulation entitled “Possession by Conservators and Receivers for Federal and State Savings Associations” from the Code of Federal Regulations because it is not necessary. This rule was included in the regulations that were transferred to the FDIC from the Office of Thrift Supervision (OTS) on July 21, 2011, in connection with the implementation of Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

DATES: Effective [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Frank C. Campagna, Associate Director, Receivership Operations, Division of Resolutions and Receiverships (972) 761-8025 or FrCampagna@FDIC.gov; or Shane Kiernan, Counsel, Legal Division (703) 562-2632 or skiernan@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Act

The Dodd-Frank Act,¹ signed into law on July 21, 2010, provided for a substantial reorganization of the regulation of State and Federal savings associations and their holding companies. Beginning July 21, 2011, the transfer date established by section 311 of the Dodd-Frank Act,² the powers, duties, and functions formerly performed by the OTS were divided among the FDIC as to State savings associations, the Office of Comptroller of the Currency (OCC) as to Federal savings associations, and the Board of Governors of the Federal Reserve System (FRB) as to savings and loan holding companies. Section 316(b) of the Dodd-Frank Act³ provides the manner of treatment for all orders, resolutions, determinations, regulations, and other advisory materials that were issued, made, prescribed, or allowed to become effective by the OTS. The section provides that if such advisory materials were in effect on the day before the transfer date, they continue in effect and are enforceable by or against the appropriate successor agency until they are modified, terminated, set aside, or superseded in accordance with applicable law by such successor agency, by any court of competent jurisdiction, or by operation of law.

Section 316(c) of the Dodd-Frank Act⁴ further directed the FDIC and the OCC to consult with one another and to publish a list of the continued OTS regulations that would be enforced by the FDIC and the OCC respectively. On June 14, 2011, the FDIC's Board of Directors approved a "List of OTS Regulations to be Enforced by the OCC and the FDIC

¹ Pub. L. 111-203, 12 U.S.C. 5301, et seq. (2010).

² 12 U.S.C. 5411.

³ 12 U.S.C. 5414(b).

⁴ 12 U.S.C. 5414(c).

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.” This list was published by the FDIC and the OCC as a Joint Notice in the Federal Register on July 6, 2011.⁵

FDIC’s Authority

Although section 312(b)(2)(B)(i)(II) of the Dodd-Frank Act⁶ granted the OCC rulemaking authority relating to both State and Federal savings associations, nothing in the Dodd-Frank Act affected the FDIC’s existing authority to issue regulations under the Federal Deposit Insurance Act (the FDI Act)⁷ and other laws as the “appropriate Federal banking agency.” Section 312(c) of the Dodd-Frank Act amended section 3(q) of the FDI Act⁸ and designated the FDIC as the “appropriate Federal banking agency” for State savings associations. As a result, when the FDIC acts as the designated “appropriate Federal banking agency” for State savings associations, as it does here, the FDIC is authorized to issue, modify and rescind regulations involving such associations.

As noted, on June 14, 2011, the FDIC’s Board of Directors reissued and redesignated certain regulations promulgated by the former OTS. These transferred OTS regulations were published as FDIC interim rules in the Federal Register on August 5, 2011.⁹ When it republished the transferred OTS regulations as new FDIC regulations, the FDIC specifically noted that its staff would evaluate the transferred OTS rules and might later recommend incorporating the transferred OTS regulations into other FDIC rules, amending them, or rescinding them, as appropriate.

⁵ 76 FR 39247 (July 6, 2011).

⁶ 12 U.S.C. 5412(b)(2)(B)(i)(II).

⁷ 12 U.S.C. 1811, *et seq.*

⁸ 12 U.S.C. 1813(q).

⁹ 76 FR 47652 (August 5, 2011).

One of the regulations transferred to the FDIC set forth procedures to be followed by conservators and receivers for Federal and State savings associations upon taking possession of said entities and for providing notice of appointment. This OTS regulation, formerly found at 12 CFR Part 558, was transferred to the FDIC with only nominal changes and is now subpart N in 12 CFR Part 390.

The FDIC's authority to act as conservator or receiver and its powers and duties in those roles are set forth in the FDI Act and in regulations found in 12 C.F.R. Part 360. The Board has delegated authority to staff to establish policies and procedures for carrying out receivership operations. The FDI Act and the policies and procedures implemented and followed by FDIC staff subsume the responsibilities set forth in subpart N.¹⁰

II. Final Rule

Section 316(b) of the Dodd-Frank Act provides that the former OTS's regulations will continue in effect until they are modified, terminated, set aside, or superseded in accordance with applicable law.¹¹ After careful review of subpart N, the FDIC has determined that it should be rescinded and removed because it is unnecessary, or because it prescribes actions that are duplicative of actions taken by the OCC or state chartering authority. The provisions of the FDI Act and the FDIC's existing policies and procedures sufficiently address the provision of notice of appointment and the authority to take possession of, and exercise control over, the assets of a failed institution, including insured Federal and State savings associations. The FDIC issued a notice of proposed rulemaking to

¹⁰ Such policies and procedures include the FDIC Division of Resolution and Receivership's Failed Financial Institution Closing Manual.

¹¹ 12 U.S.C. 5414(b).

rescind and remove subpart N in the *Federal Register* and received no comments on its proposal.¹²

12 CFR 390.240 - Procedure upon taking possession.

The FDIC interim rule found at 12 CFR 390.240 (section 390.240) is the redesignation of the OTS regulation outlining procedures to be followed by conservators and receivers for Federal and State savings associations for taking possession of said entities upon appointment. The FDIC is rescinding and removing section 390.240 because it is unnecessary. Paragraph (a) requires the conservator or receiver to take possession of the failed institution's principal office in accordance with the terms of the appointment. The FDIC's procedure already provides that it takes coordinated simultaneous possession of all locations from which a failed institution operates. Moreover, the FDIC's powers and duties as conservator or receiver are set forth in the FDI Act, not pursuant to the "terms of the . . . appointment."

Paragraphs (b)(1) and (b)(5), respectively, provide that the conservator or receiver shall immediately take possession of the institution's books, records, and assets, and shall succeed to rights, titles, powers and privileges of the savings association and its stockholders, members, account holders, depositors, officers, and directors. These provisions are redundant of the FDI Act, which provides that the FDIC succeeds to "all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution" when acting as conservator or receiver.¹³

¹² 79 FR 45380, August 5, 2014.

¹³ 12 U.S.C. § 1821(d)(2)(A).

Paragraphs (b)(2), (3), and (4), respectively, instruct the conservator or receiver to “notify in writing, served personally or by registered mail or telegraph” all parties known to be holding or in possession of assets of the failed institution that the conservator or receiver has succeeded to all rights, powers and privileges of the failed institution; file a statement with the Executive Secretary that the conservator or receiver took possession of the failed institution; and post a notice on the door of the principal and other offices of the failed institution in the form, if any, prescribed by the OCC or state bank supervisor. For three reasons, these provisions are unnecessary given existing FDIC policies and procedures. First, the FDIC’s practice is to demand the return of assets of the failed institution in whatever manner and form that is appropriate under the circumstances. Second, the Executive Secretary is provided with a copy of all closing documents by FDIC staff. Third, the OCC or state bank supervisor itself posts its order closing the institution on the door of the principal office.

12 CFR 390.241 – Notice of Appointment.

The FDIC interim rule found at 12 CFR 390.241 (section 390.241) is the redesignation of the OTS regulation outlining procedures for giving notice of the appointment of a conservator or receiver for a Federal or State savings association. The FDIC is rescinding and removing section 390.241 because it is unnecessary. Specifically, paragraph (a) requires the FDIC to designate the persons or entities who are to: (1) give notice of the appointment “to any officer or employee who is present in and appears to be in charge at the principal office of the savings association;”¹⁴ (2) serve a copy of the order of appointment by (i) “leaving a certified copy of the order of appointment at the principal office of the savings

¹⁴ 12 CFR 390.241(a)(1).

association,”¹⁵ or (ii) “handing a certified copy of the order of appointment to the previous conservator . . . or the officer or employee of the savings association . . . who is present in and appears to be in charge at the principal office of the savings association;”¹⁶ and (3) file with the Executive Secretary of the FDIC a statement that includes the date and time that notice of the appointment was given and service of the order of appointment was made.”¹⁷ It is not necessary to include these provisions among the FDIC’s regulations because the OCC or state chartering authority is responsible for providing or serving notice of the appointment of the FDIC as conservator or receiver on a Federal or State savings association. Further, the FDIC’s Executive Secretary maintains records of the appointment of the FDIC as conservator or receiver. Paragraph (b), which instructs the FDIC to cause a notice of the appointment of the conservator or receiver to be published in the *Federal Register*, is unnecessary because the FDIC causes such a publication regarding any institution for which it is appointed as conservator or receiver in accordance with its policy and procedures.

For the reasons stated above, the FDIC is rescinding and removing subpart N. Doing so will serve to streamline the FDIC’s rules, prevent confusion and eliminate unnecessary regulations.

III. Regulatory Analysis

A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) (PRA), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Rescinding and removing subpart N will

¹⁵ 12 CFR 390.241(a)(2)(i).

¹⁶ 12 CFR 390.241(a)(2)(ii).

¹⁷ 12 CFR 390.241(a)(3).

not revise any existing information collections pursuant to the PRA. Consequently, the FDIC has not submitted any information collection request to the OMB for review.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* (RFA), requires that each federal agency either (1) certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or (2) prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment.

Rescinding and removing subpart N will leave the FDI Act as the sole source of the FDIC's authority to act as conservator or receiver for an insured depository institution and does not impose any obligations or restrictions on banking organizations, including small banking organizations. On this basis, the FDIC certifies that the removal of subpart N would not have a significant impact on a substantial number of small entities within the meaning of those terms as used in the RFA.

C. Small Business Regulatory Enforcement Fairness Act

No notice of a final rule is being provided to Congress regarding this amendment under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801, *et seq.*, (SBREFA). SBREFA provides generally for agencies to report rules to Congress and for major rules not to take effect for a certain period after the notice has been received. However, section 251 of SBREFA provides that rules of agency practice and procedure that do not substantially affect the rights or obligations of non-agency parties are not subject to the reporting requirement and may be made effective in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and any other applicable law. The Office of

Management and Budget has determined that the Final Rule is not a “major rule” within the meaning of SBREFA.

D. The Economic Growth and Regulatory Paperwork Reduction Act

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (“EGRPRA”), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions. The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and has commenced the next decennial review. The action taken on this rule will be included as part of the EGRPRA review that is currently under way.

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338, 1471, 12 U.S.C. 4809, requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a federal banking agency subject to the provisions of this section, the FDIC has sought to present the final rule to rescind and remove subpart N in a simple and straightforward manner. The FDIC’s proposal to rescind and remove subpart N invited comments on whether the proposal was clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand. No comments were received.

List of Subjects in Part 390

Banks and banking, Savings associations.

Authority and Issuance

For the reasons stated in the preamble and under the authority of 12 U.S.C. 5412, the Board of Directors of the Federal Deposit Insurance Corporation amends 12 CFR part 390 as follows:

PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION

1. The authority citation for part 390 is revised to read as follows:

Authority: 12 U.S.C. 1819.

Subpart F also issued under 5 U.S.C. 552; 559; 12 U.S.C. 2901 et seq.

Subpart G also issued under 12 U.S.C. 2810 et seq., 2901 et seq.; 15 U.S.C. 1691; 42 U.S.C. 1981, 1982, 3601-3619.

Subpart I also issued under 12 U.S.C. 1831x.

Subpart J also issued under 12 U.S.C. 1831p-1.

Subpart L also issued under 12 U.S.C. 1831p-1.

Subpart M also issued under 12 U.S.C. 1818.

Subpart O also issued under 12 U.S.C. 1828.

Subpart P also issued under 12 U.S.C. 1470; 1831e; 1831n; 1831p-1; 3339.

Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.

Subpart R also issued under 12 U.S.C. 1463; 1464; 1831m; 1831n; 1831p-1.

Subpart S also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1468a; 1817; 1820; 1828; 1831e; 1831o; 1831p-1; 1881-1884; 3207; 3339; 15 U.S.C. 78b; 78 l; 78m; 78n; 78p; 78q; 78w; 31 U.S.C. 5318; 42 U.S.C. 4106.

Subpart T also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78 l; 78m; 78n; 78w.

Subpart V also issued under 12 U.S.C. 3201-3208.

Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78 l; 78m; 78n; 78p; 78w.

Subpart X also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828; 3331 et seq.

Subpart Y also issued under 12 U.S.C. 1831o.

Subpart Z also issued under 12 U.S.C. 1462; 1462a; 1463; 1464; 1828 (note).

Subpart N–[Removed and Reserved]

2. Remove and reserve subpart N consisting of §§ 390.240 through 390.241.

Dated at Washington, D.C., this 21st day of January, 2015.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman

Executive Secretary.

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